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In the

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF
~~THE VIRGINIA TRIAL LAWYERS~~ ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is an arrest (and incident search) for a nonarrestable offense constitutionally unreasonable in violation of the Fourth Amendment?

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BRIEF *AMICUS CURIAE* SUBMITTED BY THE VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

COMES NOW the Virginia Trial Lawyers Association and files this Brief of Amicus Curiae in support of the Respondent, David Lee Moore, and supporting the decision of the Supreme Court of Virginia, in *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006).

STATEMENT OF INTEREST[1]

The Virginia Trial Lawyers Association ("VTLA") is an organization of over twenty-four hundred attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and rights, and supporting an efficient and constitutionally sound judicial system. The VTLA includes among its sections a Criminal Law Section, and VTLA members regularly participate in trials in state and federal courts.

The VTLA and its members clearly have a substantial interest in protecting and preserving the American system of justice and the rights of citizens. In this case, substantial questions of individual

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

rights under the United States Constitution are implicated. The VTLA, its members, and the citizens we represent, all have an important interest in constitutional rights, such as those maintained in the Fourth Amendment.

For the protection of our individual rights, the decision of the Supreme Court of Virginia should be affirmed.

SUMMARY OF THE ARGUMENT

When officers lack authority to arrest a suspect, an arrest is constitutionally unreasonable. A search incident to an unlawful arrest is also unreasonable and violates the Fourth Amendment.

The States have the power to criminalize certain conduct, or even label such conduct criminal or civil, and likewise the States have the power to authorize arrest for certain conduct. To conduct a Fourth Amendment analysis, courts must rely on the State's definition an offense, or – more specifically – the State's definition of an arrestable offense. It is neither contrary to the principles of constitutional analysis nor a State's rights to decide that an arrest under State law must be lawful under State law to pass constitutional muster as an arrest which justifies a search incident to arrest.

ARGUMENT

An arrest which is not authorized by State law, and therefore unlawful, is unreasonable under the Fourth Amendment, and so too is a search incident to an unlawful arrest.

The Fourth Amendment safeguards "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

It should be clear that an arrest for non-arrestable conduct is unreasonable. This conclusion is consistent with what the Framers of the Amendment might have thought to be reasonable. If the seizure of the person is unreasonable under the constitution, so too is the search of the person incident to the unlawful arrest.

As stated by the Respondent, the Fourth Amendment permits a search incident only to a "lawful arrest." *E.g.*, *United States v. Robinson*, 414 U.S. 218, 224 (1973); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948) (holding that an arrest in violation of state law also violated the Fourth Amendment because "[s]tate law determines the validity of arrests without warrant").

1. When law enforcement officers lack authority to arrest a suspect, a search incident to the unlawful arrest violates the Fourth Amendment.

Under the Fourth Amendment, the constitutional reasonableness of a custodial arrest is measured by whether probable cause existed for the arrest. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (confirming that the standard of probable cause applies to all arrests and holding that the Fourth Amendment does not proscribe any arrest made with probable cause).

In *Atwater*, this Court held that under the Fourth Amendment a warrantless custodial arrest based only on probable cause of a mere seatbelt violation, for which jail time was not authorized, was permissible. *Id.* The majority of this Court preferred to remain with what it considered the traditional probable cause standard for constitutional reasonableness, rather than to "mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness." *Id.* at 345-46. Thus, this Court held fast with probable cause as the test of reasonableness, "without the need to balance the interests and circumstances involved in particular situations." *Id.* at 354. This Court ultimately held that the arrest of the defendant satisfied constitutional requirements, and this Court stated,

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.*

In *Atwater*, Justice O'Connor dissented, disagreeing that the constitutional propriety of the custodial arrest, which she characterized as "the quintessential seizure," should be limited to whether probable cause existed. *See id.* at 360-62 (O'Connor, J., dissenting). In Justice O'Connor's view, the reasonableness inquiry required not only a determination of the existence of probable cause, but also an evaluation of the seizure under the standard rejected by the majority, namely, by assessing the intrusion upon individual privacy against the need to promote legitimate governmental interests. *Id.* at 361.

In the current matter, the question is in fact easier than balancing individual privacy interests against the need to promote legitimate governmental interests. If a person who probably has violated state law is not subject to arrest under state law, any such arrest is therefore unreasonable by every measure, including constitutional dictates. In other words, consistent with the Fourth Amendment, law enforcement officers must have "probable cause to arrest" a person for a suspected violation of State law, and "probable cause to arrest" should be prevailing standard here.

2. The States have the power to criminalize certain conduct, or even label such conduct criminal or civil, and likewise the States have the power to authorize arrest for certain conduct.

It should be beyond dispute that States have the power to criminalize certain conduct, and certainly some States might label certain conduct as "criminal" while other States may not. Furthermore, some States might establish punishment for the State law violation to include, for example, potential fines, jail time, prison time, execution, or some combination thereof.

As established in *Atwater*, the question is not whether the proscribed conduct could carry jail time; the question is whether the arrest was supported by probable cause. When evaluating the "probable cause" standard of reasonableness, the constitutional analysis is necessarily dependent upon the State law which defines and categorizes conduct. It is insufficient to say that the only reasonableness requirement is whether there is probable cause to believe that the person has engaged in certain conduct labeled "criminal." To conduct a Fourth Amendment analysis, courts must rely on the State's definition an offense, or – more specifically – the State's definition of an arrestable offense.

It is consistent with the principles of constitutional analysis to decide that an arrest under State law must be lawful under State law to pass constitutional muster as an arrest which is

"reasonable" and therefore justifies a search incident to arrest.

3. A search incident to an arrest when the arrest is unlawful under State law violates the reasonableness requirement of the Fourth Amendment.

Mere probable cause to believe some violation of some law is not a license to conduct any "search" or "seizure" at the whim of a law enforcement officer. *See, e.g., Knowles v. Iowa*, 525 U.S. 113 (1998) (probable cause of a citation-only offense does not justify search of individual's person); *Payton v. New York*, 445 U.S. 573 (1980) (probable cause does not justify entry into the home to conduct arrest).

If the officers lack the authority to arrest a person suspected of violating State law, the traditional justifications for the search incident to the arrest are not present. Like the situation in *Knowles*, when the arrest is not authorized, the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all.

Because officers will know whether they are allowed to arrest a person for a particular offense, there is no concern for certain variables that could materially alter the Fourth Amendment analysis of what is and is not constitutionally reasonable. The authority to arrest depends entirely on facts that are necessarily available to the officers and whether there is probable cause to believe that a person's conduct is subject to arrest under State law.

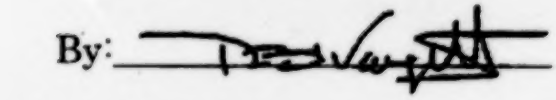
In short, regardless of the type or degree of punishment for a violation of State law, "probable cause to arrest" necessarily turns on whether State law classifies a violation subject to arrest. Here, the arrest was not permitted, and the subsequent seizure of the person was constitutionally unreasonable. Because the arrest was constitutionally unreasonable, the search incident to the arrest violated the Fourth Amendment, and the decision below should be affirmed.

CONCLUSION

According, the VTLA urges this Court to affirm the decision of the Supreme Court of Virginia.

Respectfully submitted,

THE VIRGINIA TRIAL
LAWYERS ASSOCIATION

By: 

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